Supreme Court, U. S.
FILED
APR 9 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. A-721

PATRICK JOSEPH SEXTON,

76-1385

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR COUNTY OF ORANGE, STATE OF CALIFORNIA

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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1976
No. A-721

PATRICK JOSEPH SEXTON,

Petitioner,

vs.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Patrick Joseph Sexton, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court in and for the County of Orange, State of California, rendered in this proceeding on November 29, 1976.

OPINION BELOW

No written opinion was rendered by the Appellate Department of the Superior Court in and for the County of Orange, State of California.

JURISDICTION

The judgment of the Appellate Department of the Superior Court was entered on November 29, 1976 (Appendix A, infra). Thereafter, in an effort to exhaust all possible state-court remedies, the petitioner filed a Petition for Rehearing and, alternatively, an Application for Certification and Transfer, each of which were denied on December 10, 1976 (Appendix B, infra). This Petition for Certiorari was filed within the extended time from the date aforesaid.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

---

1. Whether the petitioner was denied due process of law, pursuant to the principles expounded in Morrissey v. Brewer, 408 U.S. 471 (1972) because his status in the Lucky Deuce Foundation alcohol rehabilitation program was arbitrarily terminated and revoked without a hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On June 21, 1974, a complaint was issued and filed in the Municipal Court of Central Orange County Judicial District, County of Orange, State of California, charging the petitioner with violating California Vehicle Code §23102(a), commonly known as driving under the influence of alcohol and/or drugs.

At the time of his arraignment, the petitioner and the prosecutor entered into a stipulation in open court whereby the proceedings would be suspended on the condition that the petitioner enroll and participate in an alcohol abuse program entitled the Lucky Deuce Foundation. It was further agreed that should the petitioner successfully complete the program, the complaint against him would be dismissed or the charges reduced. On the other hand, it was additionally stipulated that should the petitioner fail to complete the program, he

would be found guilty as charged and sentenced accordingly.

The program was divided into three phases, of which the petitioner successfully completed phases I and II. However, after 18 months of active involvement in said program, the petitioner was unilaterally terminated therefrom by the program director, ostensibly on the general ground that he did not cooperate and successfully accomplish the final requirements of phase III.

The prosecutor thereupon notified the judge of the Municipal Court wherein the above stipulation was made of the program director's action and further criminal proceedings were activated.

On April 22, 1976, the petitioner appeared before the Honorable Edward Laird, Judge of the Municipal Court, and requested a formal hearing on the issue of whether there was good cause to terminate him from the program.

The court denied the request for a hearing and summarily adjudged the petitioner guilty on the original charge. Imposition of sentence was suspended. The petitioner was placed on probation, on the condition that he violate no law, that he pay a fine and a penalty assessment, and that he spend time in the County Jail. Execution of sentence was stayed to allow the petitioner time within which to seek his appeals.

The petitioner appealed to the Appellate Department of the Superior Court and the judgment of conviction was affirmed (Appendix A, infra).

In an effort to exhaust all possible state court remedies, the petitioner filed a timely Petition for Rehearing and simultaneously filed a timely Application for Certification and Transfer, each of which were denied on Dec. 10, 1976 (Appendix B, infra). Moreover, since there was no written opinion accompanying the Judgment of the Appellate Department of the Superior Court, the petitioner was effectively precluded from seeking any further direct appeal within the criminal justice appellate system of the State of California (Appendix C, infra).

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

1. The Decision Below Conflicts with the Decision and Opinion of This Court in Morrissey v. Brewer, infra.

The basic and paramount issue presented in this case is whether the due process principles[1/]

1/ This Court in Morrissey apparently settled on a two-step analysis in applying the dictates of procedural due process in the context of parole revocation. In this regard, Mr. Chief Justice Burger wrote that "once it is determined that

(continued on p. 6)

enunciated by this Court in the landmark case of Morrissey v. Brewer, supra, and its progeny dictate that before the petitioner's status in the alcohol rehabilitation program may be revoked he must be afforded an opportunity to be heard. Obviously this is a question of great importance to the entire criminal justice system and the public. It has never been directly decided by this Court and should be.

In Morrissey, this Court pointed out that parole is "an integral part of the penological system," that its purpose is to help "reintegrate

---

1/ (continued from previous page)

due process applies, the question remains what process is due." 408 U.S. at 481.

However, it is the intention and scope of this brief to limit the writing to the subject of whether the interest of the petitioner which is being threatened in this cause is within the contemplation of the liberty or property language of the Fourteenth Amendment.

The remaining issue in the above mentioned two prong test of Morrissey will not be broached herein in that this writer considers that issue in the context of this case to be within the sound discretion of this Court. Suffice it to say, that some type of hearing with an opportunity to present evidence and to confront and cross-examine witnesses should be required.

(people) into society as constructive individuals," and that it alleviates "the costs to society of keeping an individual in prison." This Court therefore, in its wisdom, found that a parolee's liberty was an interest worth protection. 408 U.S. at 477.

The Morrissey rationale has been followed by the California Supreme Court. See, In re Prewitt, 8 Cal. 3d 470, 503 P. 2d 1326, 105 Cal. Rptr. 318 (1972) (parole); and People v. Vickers, 8 Cal. 3d 451, 503 P. 2d 1313, 105 Cal. Rptr. 305 (1972), wherein due process protection was afforded to a person faced with probation revocation.

Furthermore, in the case of In re Charles Bye on Habeas Corpus, 12 Cal. 3d 96, 524 P. 2d 854, 115 Cal. Rptr. 382 (1974), cert. denied 420 U.S. 996 (1974), wherein an individual was committed under a civil addict program, Chief Justice Wright, speaking for a unanimous court, concluded that an outpatient possesses an interest in his liberty which is likewise entitled to the due process protection of a hearing.

In addition, most recently, the California Court of Appeal (Second District) in Kramer v. Municipal Court, 49 Cal. App. 3d 418, 122 Cal. Rptr. 672 (1975), held that a defendant cannot be terminated from a drug diversion program[2]/

2/ Under the Diversion Program, if the defendant decides that he wishes further consideration for diversion, he must waive his

(continued on p. 8)

for cause without an adequate hearing beforehand.

2/ (continued from previous page)

rights to a speedy trial, and then he is referred to the Probation Department for investigation. Upon completion of the investigation, the Probation Department reports its findings to the Court and if the Court orders diversion, further criminal proceedings are stayed against the defendant for a period of six (6) months to two (2) years at the discretion of the Court.

In contrast, pursuant to the Lucky Deuce Program, the defendant ostensibly familiarizes himself with the program by and through an orientation and an interview with program members and officials, and then, if he is agreeable to and is accepted by the program, enters into a stipulation with the Court which is tantamount to a guilty plea. Thereupon, the proceedings are suspended for a period of approximately eighteen (18) months for the defendant to participate in and complete the program.

Thereafter, the defendant under each program, makes intermittent appearances in Court, either personally or by and through his counsel, and the Probation Department or the Lucky Deuce Foundation (whichever is the case) makes a progress or status report to the Court. At the end of the Diversion or Lucky Deuce Program the defendant is ordered to return to the Court for a final determination of his case.

Justice Kaus, writing for the majority, noted the array of due process cases as well as statutes and charters which entitle an individual to a hearing under innumerable circumstances in which the individual may be deprived of something, whether it is his liberty, rights, a license or a job. The Presiding Justice further allowed that common fairness and justice compel the requirement of a hearing as a condition precedent to deprival of a protected right.

Like parole and the various drug diversion programs mentioned above, the alcohol treatment programs such as the Lucky Deuce Foundation have become an integral part of the criminal justice system in California and elsewhere.

It is common knowledge that "the problems of alcoholism and the drinking driver are serious ones for which our society has found no easy solution." Department of Motor Vehicles v. Superior Court, San Mateo County, 58 Cal. App. 3d 936, 940, 130 Cal. Rptr. 311 (1976). Consequently, our system of criminal justice is in the process of implementing and experimenting with alcoholism treatment programs.3/ These programs

3/ In addition to the Lucky Deuce Foundation program in Orange County, other similar programs are cropping up all over the State of California. For example, the California legislature has recently adopted a pilot program in four counties which enables the courts to send a drinking driver to a rehabilitation program as

(continued on p. 10)

are designed to aid in rehabilitation and they reduce the costs of trials and incarceration.

If these programs are to prove viable and credible they cannot be misused or abused. The individuals participating therein must be protected. Accordingly, it is submitted that the due process protections akin to those requirements in the parole revocation context would be the most efficacious and adequate means to challenge any arbitrariness and unreasonableness on the part of these programs.

Moreover, the interest of the petitioner and other persons similarly situated at stake in these programs such as the Lucky Deuce Foundation is the same as that in parole revocations: if the individual is terminated from the program, there will most assuredly be a conviction and a consequent loss of liberty. Thus, the petitioner and like individuals assigned to such local programs for restorative and rehabilitative purposes remain in such programs on a conditional liberty status which should not be arbitrarily revoked without the minimum procedural due process safeguards being afforded.

Thus, it is respectfully submitted that the petitioner's constitutional rights under the due process clause of the Fourteenth Amendment were violated in that he was not allowed a hearing before his status with the Lucky Deuce Foundation program was arbitrarily terminated and revoked.

3/ (continued from previous page)

a condition precedent to keeping his driving privileges (Appendix D, infra).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Appellate Department of the Superior Court.

Resepctfully submitted,

ROBERT M. MOSS

Attorney for Petitioner

APPENDIX A

Entered in the Register of Actions on November 29, 19 76

R. E. St John, County Clerk, by M.M. Cuevas, Deputy

25

APPELLATE DEPARTMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff(s) and Respondent, vs. PATRICK JOSEPH SEXTON, Defendant(s) and Appellant.	NO. AP-2065 ON APPEAL from the MUNICIPAL COURT of the ORANGE COUNTY CENTRAL JUDICIAL DISTRICT HON. EDWARD L. LAIRD, JUDGE

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the judgment of conviction, California Vehicle Code §23102(a) made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby affirmed

The cause is remanded to the Municipal Court for further proceedings.

Dated this 29th day of November, 19 76.

CHARAMZA, Judge

SPEIRS, Judge

KNEELAND, Presiding Judge

APPENDIX B

FILED
Dec 6 - 1976
William E. St. John,
County Clerk
By_____Deputy

APPELLATE DEPARTMENT
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	NO. AP 2065
	)	APPLICATION
	)	FOR CERTIFICA-
VS.	)	TION AND
	)	TRANSFER
PATRICK JOSEPH SEXTON,	)	(Oral Argument
	)	Requested)
	)	

TO THE HONORABLE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OR ORANGE:

The undersigned respectfully applies for Certification of the above-entitled case to the Court of Appeal, State of California pursuant to California Court Rules 62, 63.

The Application is made on the ground that such transfer is necessary to settle important questions of law and to secure uniformity of decision.

Appellant respectfully submits that the following questions are involved in this request for transfer:

1. Whether the constitutional due process principle embodied in Morressey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 C. Ed. 2d 484 (1972) and the many decisions applying it, demanded a hearing before appellant's status as a LUCKY DEUCE FOUNDATION member could be terminated and revoked by the Foundation the trial court.

2. Whether the fact that the LUCKY DEUCE FOUNDATION has been denominated as a private entity should alter the applicability herein of the due process protections enunciated in Morrissey, supra.

3. Whether the trial court action herein constituted State or Governmental action for application of the above-mentioned constitutional principles.

WHEREFORE, Appellant respectfully prays that this Court certify this case to the Court of Appeal.

Dated: December 3, 1976

Respectfully submitted,

/s/ Robert M. Moss
ROBERT M. MOSS,
Attorney for Appellant

F I L E D
Dec 6 1976
William E. St. John,
County Clerk
By_____Deputy

APPELLATE DEPARTMENT
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA,	)	NO. AP 2065
Petitioners,	)	PETITION FOR REHEARING
vs.	)	
PATRICK JOSEPH SEXTON,	)	(Oral Argument Requested)
Defendant	)	

TO THE HONORABLE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE:

Petitioner is the Appellant in the above-entitled cause, which was heard on November 24, 1976, and was decided on November 29, 1976, in favor of Respondent by affirmance of the Judgment of the trial court.

Petitioner requests, pursuant to California Court Rule 107, that said decision and Judgment

be vacated and a rehearing granted in order to prevent a miscarriage of justice.

Petitioner's grounds are as follows:

1. The constitutional due process principles embodied in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 C. Ed. 2d 484 (1972) and the many decisions applying it, demanded a hearing before Appellant's status as a LUCKY DEUCE FOUNDATION member could be terminated and revoked by the Foundation and the trial court.

2. The fact that the LUCKY DEUCE FOUNDATION has been denomiated as a private entity should not alter the applicability herein of the due process protections enunciated in Morrissey, supra.

3. The trial court action herein constituted State or Governmental action for application of the above mentioned constitutional principles.

Petitioner's argument on the foregoing issues is basically as follows:

The Appellant's conditional liberty status which is threatened is an interest within the contemplation of the liberty or property language of the Fourteenth Amendment. This interest has indeed been affected by Governmental action and therefore, should be afforded due process protections. Although LUCKY DEUCE FOUNDATION has been denominated private, this fact should not alter the applicability of due process safeguards to the Appellant's conditional liberty

interest. See also, In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

WHEREFORE, Appellant prays for an Order vacating the Judgment of the Honorable Appellate Department and granting a hearing.

Dated: December 3, 1976

Respectfully submitted,

/s/ Robert M. Moss
ROBERT M. MOSS,
Attorney for Appellant

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Dept. APPELLATE

Court covenend at 10:00 A. M.
DECEMBER 10, 1976 present
Hon. KNEELAND, Presiding, Judge;
H. J. Gallagher Deputy Clerk;
--- , Deputy Sheriff; --- Reporter.

and the following proceedings were had:

AP-2065 PEOPLE vs. SEXTON

Petition for rehearing or in the alternative, Petition for certification to the Court of Appeal having been timely filed and the Court having considered the Petitions and reviewed the record; does now rule: the Petitions and each of them are hereby denied.

ENT. 12-10-76

APPENDIX C

Rule 28. HEARING IN SUPREME COURT

(b) [Time for filing petition] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. When such copy is delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan 2, 1962; Nov. 11, 1966; Jan. 1, 1972.

Rule 62. TRANSFER

(a) [Cases transferable] A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate

department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. As amended, effective Nov. 11, 1966.

Rule 63. CERTIFICATION

(a) [Authority to make] The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. The certificationmay be made by a majority of the judges of the appellate department. When there was a trial in the superior court, the judge who tried the case may make the certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court. As amended, effective Nov. 11, 1966; Jan. 1, 1977.

APPENDIX D

Section 13201.5 provides:

"(a) A court may suspend the privilege of any person to operate a motor vehicle, for a period not exceeding six months, upon conviction of driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug.

In the alternative, and in addition to the provisions of subdivision (c) of Section 23102 and the provisions of Section 23102.3, a court may refrain from suspending such privilege if the person convicted of such offense has consented to participate in, for at least one year and in a manner satisfactory to the court, a public or private program for the treatment of problem drinking or alcoholism which, regardless of how it is funded, meets standards established by the Office of Alcohol Program Management, which shall include, but need not be limited to, the following:

(1) Each program shall provide for close and regular supervision of the person, including face-to-face interviews at least once every other calendar week, regarding the person's progress in the program.

(2) The office shall set maximum fees to be charged for participation in the program and shall require that each program make provision for persons who cannot afford such fees in order to enable such persons to participate in such programs.

(3) Each program shall include a variety of treatment services for problem drinkers and alcoholics or shall have the capability of referring such persons to, and regularly and closely supervising such persons while in, appropriate treatment services for their problem drinking or alcoholism.

In utilizing any such program, the court shall require periodic reports concerning the performance of the person participating in a program and the immediate report of any failure of the person to comply with the program's rules and regulations. If, at any time while participating in the program, the person fails to comply with the rules and regulations of the program, the court, upon finding such fact, shall immediately suspend, or order suspension or revocation of, the privilege of such person to operate a motor vehicle for the period prescribed by law.

No person may be admitted into a program for the treatment of problem drinking or alcoholism pursuant to this section more than once.

The provisions of this section afford a rehabilitative program for problem drinkers

or alcoholics that is in addition to any other program or procedure relating to treatment of drinking drivers established in the criminal justice system, and the provisions of this section shall not be construed to restrict or supersede such programs or procedures, nor to prevent the future establishment of similar programs or procedures.

Further, the provisions of this subdivision shall not be construed as requiring a court, upon a first conviction of a person for driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug, to suspend the privilege of that person to operate a motor vehicle if the court finds that a program for the treatment of problem drinking or alcoholism is not appropriate for such a person and if such person has consented to participate in, and does participate in and successfully completes, a driver improvement program designated by the court, as provided in subdivision (c) of Section 23102.

(b) In order to determine which types of programs can most effectively provide for treatment of persons convicted of such offenses, this section shall be implemented during the period from January 1, 1976, through December 31, 1977, on a demonstration basis in four or fewer counties deemed most appropriate for that purpose by the office. The office shall approve several types of programs in such counties in order to prepare for effective implementation of this section statewide. This section shall be applicable in all counties commencing January 1, 1978."

Section 13352.5 provides:

"(a) The department may not suspend or revoke, pursuant to subdivision (a), (c), or (e) of Section 13352 or any other provision of law, the privilege of any person to operate a motor vehicle upon a conviction or finding that the person was driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug, if the court has certified to the department that such person has consented to participate for at least one year, and is participating, in a manner satisfactory to the court, in a public or private program for the treatment of problem drinking or alcoholism pursuant to the provisions of Section 13201.5 or, with respect to a first conviction of such offense, in a driver improvement program designated by the court, as provided in subdivision (c) of Section 23102.

(b) All abstracts of record showing such a conviction that are forwarded to the department pursuant to Section 1803 shall indicate whether the person convicted has consented to participate, and is participating, in such a program for the treatment of problem drinking or alcoholism or such a driver improvement program."

3. The four demonstration counties are Kern, Ventura, Yuba and Santa Clara.

IN THE

Supreme Court of the United States

FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

October Term, 1976

No. A-721

— 76-1385

PATRICK JOSEPH SEXTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

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PATRICK JOSEPH SEXTON,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioner has attached to the petition, as Appendix A, a copy of the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Orange, filed without opinion, November 29, 1976.

JURISDICTION

The jurisdictional facts of the case appear adequately set forth in the petition.

QUESTION PRESENTED

Whether due process of law, as contemplated by the Fifth and Fourteenth Amendments to the United States Constitution, entitles Petitioner to a hearing when he is removed from a private alcohol-abuse program, and if so, whether that hearing must be somehow greater in scope than that offered him here.

STATEMENT OF THE CASE

On June 21, 1974, a complaint was issued and filed in the Municipal Court of the Central Orange County Judicial District, County of Orange, State of California, charging Petitioner with a violation of California Vehicle Code Section 23102(a), commonly known as driving under the influence of alcohol and/or drugs. Petitioner was arraigned on the charge and entered a plea of not guilty.

On a date set for jury trial, after Petitioner's case had twice been continued on his motion, he entered into a stipulation with the prosecution, whereby his case would be continued in order that he could enroll in and attempt to complete an alcohol-abuse program administered by the Lucky Deuce Foundation, a private organization.

That stipulation has never been made a part of the record in the case except as it is reflected in the notices of termination

from the program filed with the court (see Appendix A, attached hereto) and the transcript of the proceedings in court when Petitioner's 23102(a) case was submitted on the basis of that stipulation and any evidence he chose to submit in addition (see Appendix B, attached hereto).

The stipulation was accepted by the court, and Petitioner's case thereafter continued for several months. On December 26, 1975, however, the Lucky Deuce Foundation notified the court that Petitioner had been terminated from the program for several reasons, including his arrest for another violation of Vehicle Code Section 23102(a) in Los Angeles. See Appendix A. (Appendix p. 4.)

Continuances of Petitioner's case were thereafter denied, and on April 22, 1976, the case was submitted on Petitioner's stipulation, which, according to the transcript included an admission of a blood-alcohol level of .26 and the fact that Petitioner was under the influence of alcohol. Petitioner declined to present additional evidence and was convicted. The court refused to hold a hearing on the issue of whether Petitioner was "properly" terminated from the Lucky Deuce Foundation program.

The Petitioner was placed on informal probation, on the condition that he violate no law, pay a fine, and serve a statutorily mandated minimum 48 hours in the county jail. Execution of sentence was stayed to allow the Petitioner time within which to appeal.

Petitioner's conviction was affirmed by the Appellate Department of the Superior Court on November 29, 1976.

ARGUMENT

Petitioner contends that he has been unconstitutionally deprived of his "rights under the due process clause of the Fourteenth Amendment . . . in that he was not allowed a hearing before his status with the Lucky Deuce Foundation program was arbitrarily terminated and revoked." Petition, page 10. This argument, while possessed of a facile surface credibility, is unsupported by either fact or law.

Respondent's initial difficulty with Petitioner's position lies in his argument that he was "not allowed" a hearing before being terminated from the program administered by the Lucky Deuce Foundation. This argument is only fathomable if it is assumed that Petitioner asserts that he has a right to a *judicial, evidentiary* hearing, and Respondent is unable to find support for such a contention.

It must first be emphasized that the "Notice of Termination" filed by the Lucky Deuce Foundation on December 26, 1975, recites that "Defendant did not appeal the staff action to the Appeals Committee consisting of three Lucky Deuce graduates. Appeal process explained, offered, but defendant declined." Appendix A.

The nature of this process seems rather clearly delineated by the following paragraph of the form, inapplicable to Petitioner's case, and therefore left incomplete by the Foundation:

> [ ] DEFENDANT DID APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE. A HEARING *DE NOVO* WAS HAD ON _____ (DATE) THE DEFENDANT WAS PRESENT (WITH) (WITHOUT) COUNSEL, _____. THE APPEALS COMMITTEE, BY A VOTE OF ____ TO ____ , SUSTAINED THE ACTION TO TERMINATE, AND UPON ITS FINDINGS AND CONCLUSIONS, TERMINATED THE DEFENDANT AS REPORTED AT LINE _____ OF PAGE 1, HEREOF.

For reasons unexplained on the record in this case, two such notices were filed: One on December 26, 1975, and one on February 12, 1976. Both, however, indicate Petitioner's failure to take advantage of his appeal rights with the Foundation.

Clearly, then, Petitioner *was* offered a hearing, presumably *de novo* at his option, with or without counsel, before a committee made up of Foundation members. It is respectfully submitted that this process was not only constitutionally unobjectionable, but, considering the private, non-judicial nature of the Foundation, remarkably fair and well-delineated.

It is true that Petitioner was not allowed a hearing by the court before which his misdemeanor case was pending. Respondent, however, is unable to find authority for an argument that a full judicial hearing was required.

What due process requires is merely that an impartial hearing be provided. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S., at 171-172, 95 L. Ed. 817, 71 S. Ct. 624 (Frankfurter, J., concurring)." *Mathews v. Eldridge*, 424 U.S. 319, 348-349, 47 L. Ed. 2d 18, 41, 96 S. Ct. 893. Both notice and opportunity were afforded Petitioner in this case.

Similarly, in *Hortonville Joint School District No. 1 v. Hortonville Education Association*, ... U.S. ..... , 49 L. Ed. 2d 1, 96 S. Ct. ..... , decided only last term, the Court held that

due process had been afforded teachers striking in protest of actions by the school board, where they had a right to hearing by the board itself. Even *Morrissey v. Brewer*, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593, the capstone of Petitioner's case, contemplates not a judicial hearing, but an administrative one, first by an impartial parole officer, and then by the parole board. 408 U.S. 471, 486-487, 33 L. Ed. 2d 484, 497-498, 92 S. Ct. 2593.

The hearing offered Petitioner in this case seems more than sufficient to comport with the mandates of these cases. In any event, no showing has or can be made that the procedure outlined in the Notice of Termination would have been unfair to Petitioner on the record before this Court.

All of which, of course, assumes *arguendo* that Petitioner, under the peculiar circumstances of this case, had any due process rights to a hearing in the first place. Respondent respectfully submits that there is no constitutionally cognizable due process right to participation in a private, non-statutory, non-governmental alcohol-abuse program.

The Lucky Deuce Foundation is, after all, a private entity. It is neither statutorily created nor governmentally funded. Its only involvement in this case is that it accepted Petitioner as a participant in its alcohol-abuse program. Based upon that acceptance, Petitioner was able to persuade the prosecution to stipulate to a continuance of his case, and possibly a favorable disposition of it in the event Petitioner successfully completed the program.

Unfortunately, Petitioner has never made the stipulation itself part of the record. That alone would seem to make this an inopportune case in which to attempt to determine the constitutionality of the procedures employed. The termination notice and the transcript of proceedings in the trial court rather clearly indicate that by its terms Petitioner admitted his blood alcohol level and that he was under the influence, but retained the right to offer additional testimony. Transcript April 22, 1976, p. 3, lines 7 - 12; Termination Notice, Appendix A, p. 1. Yet, nothing in the record provides the Court with the full stipulation.

At any rate, there is no indication that the stipulation purported to divest the Foundation of its ability to administer its own program. It remained a private entity with a right to perform its function without supervision by the State of California.

This was not, after all, a situation in which Petitioner was enmired in a state-created corrections system such as in *Morrissey v. Brewer, supra*. It was not even a situation in which he was enrolled in a governmentally created program such as in *Mathews v. Eldridge, supra*, or *In re Bye*, 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382, *People v. Vickers*, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305, and *Kramer v. Municipal Court*, 49 Cal. App. 3d 418, 122 Cal. Rptr. 672, the state decisions upon which Petitioner relies.

Petitioner entered into a stipulation granting him a continuance so that he could take part in this *private* program. He was not legally required to do so, and the program he chose was neither created nor administered by the state. Under those circumstances, his relations *vis-a-vis* the Foundation simply did not involve his constitutional due process rights.

The case is therefore more similar to *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701, in which this Court held that employment by even a state college

does not vest in the employee a due process right to *continued* employment, requiring a hearing upon termination. As the Court, per Justice Stewart, pointed out, " . . . the range of interests protected by procedural due process is not infinite." 408 U.S. 564, 570, 33 L. Ed. 2d 548, 556-557, 92 S. Ct. 2701.

To the same effect is *Meachum v. Fano*, ... U.S. ..... , 49 L. Ed. 2d 451, 96 S. Ct. ..... . There, inmates at a state correctional facility were transferred to other facilities after having been implicated in a series of fires in the prison. Like Petitioner, they argued that they had a right to remain where they were until accorded a hearing complying with procedural due process requirements. The Court, however, rejected this argument, emphasizing that they had no *right* under state law to be in any particular correctional institute.

Respondent respectfully submits that Petitioner is in the same position as the inmates in *Meachum*. He has no legal right to participation in the Lucky Deuce Foundation, so his termination therefrom does not require a hearing. It is true that his failure to fulfill the program exposes him to state action disagreeable to him, just as it did the inmates in *Meachum*, but, as Mr. Justice White pointed out in that case, "We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." ..... U.S. ..... , 49 L. Ed. 2d 451, 458, 96 S. Ct. ..... .

The Court went on to emphasize that:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause.
>
> ..... U.S. ..... , 49 L. Ed. 2d 451, 458, 96 S. Ct. ..... .

Respondent respectfully submits that a required hearing under these circumstances would similarly involve the state courts in monitoring of private organizations not properly within their purview.

The practical effects of such a rule are staggering. Petitioner acknowledges the desirability of the criminal justice system's present experimentation with various programs for the rehabilitation of the drinking driver, and cautions against "misuse or abuse" of these programs. (Petition, p. 10.) What he overlooks is the reluctance to participate of private organizations such as the Lucky Deuce Foundation, the Red Cross, Alcoholics Anonymous, or any of a number of similarly situated private entities, if they are to be subjected to court scrutiny in their decisions concerning who is fulfilling *their* criteria and who is not.

It requires no outstanding prescience to anticipate the reaction of a private foundation upon being told by a defendant, "Yes, I want to benefit from your program, please accept me; but if you do I'm going to require you to satisfy a court that you are properly administering *your* program." Private entities will drop these programs–at least insofar as they are available to defendants with *pending* cases–like the proverbial hot rock.

Respondent does not believe that such a misfortune is mandated by the Constitution or the decisions of this Court.

It should not now be mandated where a completely private, non-governmental agency has become involved in the case at Petitioner's behest. Certainly, it should not be mandated on a record which does not fully reflect the stipulation involved, but does indicate Petitioner's refusal of a hearing by the private foundation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CECIL HICKS, District Attorney
County of Orange, State of California

MICHAEL R. CAPIZZI
Assistant District Attorney

ORETTA D. SEARS
Deputy District Attorney
Head, Writs and Appeals Section

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Deputy District Attorney

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APPENDIX A

NOTICE OF TERMINATION
REQUEST ACTION PROCEED TO COURT TRIAL
[Form 4107512]

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Municipal Court, Central Orange County Judicial District.
PEOPLE vs. PATRICK JOSEPH SEXTON
CASE NO. 356047

DEFENDANT HAS BEEN TERMINATED FROM FURTHER PARTICIPATION IN THE LUCKY DEUCE® PROGRAM. FURTHER DELAY IN THE ADJUDICATION OF THIS ACTION IS NOT IN THE INTEREST OF JUSTICE.

PARAGRAPH 7 OF THE LUCKY DEUCE® STIPULATION PROVIDES:

> **"In the event defendant (A) fails to comply sufficiently with the requirements of the curriculum, (B) fails to prove the achievement of actual, long term Productive Sobriety, (C) shall resign, or (D) is terminated from the curriculum because defendant cannot complete the program, *then*, upon due notice, the program period shall be terminated forthwith and said action set for trial on the evidence herein stipulated plus such other evidence as the parties may offer, shall proceed to verdict, and in the event of guilty verdict, shall proceed to arraignment for, and pronouncement of, judgment according to law.**

[XXXX] DEFENDANT HAS NOT COMPLIED SUFFICIENTLY

WITH THE REQUIREMENTS OF THE CURRICULUM.

[XXXX] DEFENDANT FAILED TO PROVE THE ACHIEVEMENT OF ACTUAL, LONG TERM PRODUCTIVE SOBRIETY.™.

[ ] DEFENDANT HAS RESIGNED FROM THE LUCKY DEUCE PROGRAM.

[XXXX] DEFENDANT CANNOT COMPLETE THE PROGRAM.

[XXXX] TERMINATED BY REASON OF: HAS NOT COMPLIED WITH REQUIREMENTS OF PHASE III, LUCKY DEUCE PROGRAM.

[XXXX] DEFENDANT DID NOT APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE CONSISTING OF THREE LUCKY DEUCE® GRADUATES. APPEAL PROCESS EXPLAINED, OFFERED, BUT DEFENDANT DECLINED.

[ ] DEFENDANT DID APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE. A HEARING *DE NOVO* WAS HAD ON _____(DATE). THE DEFENDANT WAS PRESENT (WITH) (WITHOUT) COUNSEL, _____. THE APPEALS COMMITTEE, BY A VOTE OF_____ TO_____, SUSTAINED THE ACTION TO TERMINATE, AND UPON ITS FINDINGS AND CONCLUSIONS, TERMINATED THE DEFENDANT AS REPORTED AT LINE ____ OF PAGE 1, HEREOF.

No Further Continuances For Any Purpose Of The Lucky Deuce® Program Are Acceptable

STAFF OFFICER'S CERTIFICATION

We declare: We have personally prepared this Notice of Termination. We know the facts and the circumstances therein

reported to be true and correct. Executed under Penalty of Perjury on FEBRUARY 12, 1976.

/s/ GLORIA A. FORREST GLORIA A. FORREST

/s/ MARK F. JOSEFF MARK F. JOSEFF

NOTICE OF TERMINATION
REQUEST ACTION PROCEED TO COURT TRIAL
[Form 4107512]

© Copyright 1975, American Traffic Health Foundation

Municipal Court, Central Orange County Judicial District
PEOPLE vs. PATRICK JOSEPH SEXTON
CASE NO. 356047

DEFENDANT HAS BEEN TERMINATED FROM FURTHER PARTICIPATION IN THE LUCKY DEUCE® PROGRAM. FURTHER DELAY IN THE ADJUDICATION OF THIS ACTION IS NOT IN THE INTEREST OF JUSTICE.

PARAGRAPH 7 OF THE LUCKY DEUCE® STIPULATION PROVIDES:

"In the event defendant (A) fails to comply sufficiently with the requirements of the curriculum, (B) fails to prove the achievement of actual, long term Productive Sobriety, (C) shall resign, or (D) is terminated from the curriculum because defendant cannot complete the program, *then*, upon due

notice, the program period shall be terminated forthwith and said action set for trial on the evidence herein stipulated plus such other evidence as the parties may offer, shall proceed to verdict, and in the event of guilty verdict, shall proceed to arraignment for, and pronouncement of, judgment according to law.

[XXXX] DEFENDANT HAS NOT COMPLIED SUFFICIENTLY WITH THE REQUIREMENTS OF THE CURRICULUM.

[XXXX] DEFENDANT FAILED TO PROVE THE ACHIEVEMENT OF ACTUAL, LONG TERM PRODUCTIVE SOBRIETY. T.M.

[ ] DEFENDANT HAS RESIGNED FROM THE LUCKY DEUCE PROGRAM.

[XXXX] DEFENDANT CANNOT COMPLETE THE PROGRAM.

[XXXX] TERMINATED BY REASON OF: DEFENDANT ARRESTED AUGUST 5, 1975 23102a LOS ANGELES JUDICIAL DISTRICT BOOKING NO. 3516-370.

[XXXX] DEFENDANT DID NOT APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE CONSISTING OF THREE LUCKY DEUCE® GRADUATES.

[ ] DEFENDANT DID APPEAL THE STAFF ACTION TO THE APPEALS COMMITTEE. A HEARING *DE NOVO* WAS HAD ON _____ (DATE). THE DEFENDANT WAS PRESENT (WITH) (WITHOUT) COUNSEL, _____ . THE APPEALS COMMITTEE, BY A VOTE OF _____ TO _____ , SUSTAINED THE ACTION TO TERMINATE, AND UPON ITS FINDINGS AND CONCLUSIONS, TERMINATED THE DEFENDANT AS REPORTED AT LINE _____ OF PAGE 1, HEREOF.

No Further Continuances For Any Purpose Of The Lucky Deuce® Program Are Acceptable

STAFF OFFICER'S CERTIFICATION.

We declare: We have personally prepared this Notice of Termination. We know the facts and the circumstances therein reported to be true and correct. Executed under Penalty of Perjury on December 26, 1975.

/s/ RICHARD A. PALMER RICHARD A. PALMER

/s/ BETTY SPRINGER BETTY SPRINGER

PAGE 3 OF TRANSCRIPT OF PROCEEDINGS
April 22, 1976

In the Municipal Court, Central Orange County Judicial District.

PEOPLE vs. PATRICK JOSEPH SEXTON.

CASE NO. 356047.

. . . .

is a stipulation – in essence it is a submission on the preliminary hearing transcript which amounts to a guilty plea, and in essence I feel this stipulation in this case is tantamount to a guilty plea. The Court, as I believe, has indicated such in open court and chambers, it's a guilty plea.

THE COURT: It looks like it. I don't think it prohibits the defendant from testifying, but the stipulation indicates – that bearing his signature – indicates he was over .10, a .26, and in fact under the influence of alcohol. So I assume it doesn't prevent him from testifying but it would be contradictory to stipulation.

MR. MOSS: At the time he entered that stipulation he stipulated to certain facts; and whereas I do not wish at this time to go into the stipulation per se, I'm not going to attack the stipulation now, recognize or acknowledge it or give it any credence to that stipulation, I think contention –

THE COURT: I think we're probably getting out of order because basically what the People have done is submitted the stipulation as their case in chief and it will be received as People's 1 into evidence. Then the People have rested. So really what we are doing now is asking if you have any evidence.

MR. MOSS: Well with respect to the question on that specific issue, I do not have any evidence to offer to

. . . .

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JUNE 16, 1977, I served the within BRIEF FOR RESPONDENT IN OPPOSITION (NO. A-721) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ROBERT M. MOSS
6404 Wilshire Boulevard
Suite 1001
Los Angeles, California 90048
2 copies

EVELLE YOUNGER, Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
1 copy

W. E. ST. JOHN, Clerk
Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

HON. ROBERT P. KNEELAND
Judge of Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

HON. WILLIAM C. SPEIRS
Judge of the Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

HON. WALTER CHARAMZA
Judge of Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

1 copy only to each of the above judges
and 1 copy to the Clerk of the Superior Court

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON JUNE 16th, 1977, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer